

STATE OF MICHIGAN
COURT OF APPEALS

JAMES N. GREEN,

Plaintiff-Appellant,

v

PROVIDENCE MEDICAL CENTER, GARY
MARCH, MARY ANN KRIER, and BRENDA
DUNHAM,

Defendants-Appellees.

UNPUBLISHED
February 17, 2005

No. 250706
Oakland Circuit Court
LC No. 2002-044342-CZ

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff sued defendants Providence Medical Center, medical assistant Brenda Dunham, Dr. Gary March, and nurse Mary Ann Krier. Based on the medical care he received from them on October 4, 2000, he alleged 1) negligence, 2) assault and battery, 3) unauthorized release of medical records, and 4) conversion of and damage to personal property. Defendants moved for summary disposition. The trial court granted the motion on the ground that defendants were immune from suit. Plaintiff appealed as of right. We affirm.

On the night of October 4, 2000, police responded to a call from security personnel at Ford Motor Company's Wixom plant. Plaintiff was seen driving out of control before coming to a stop in the visitor parking lot. His car had one shredded tire, its front end was smoking, and grass and weeds were lodged in the frame, indicating that plaintiff had driven off the road and may have been in an accident. Plaintiff was visibly intoxicated. His eyes were bloodshot, his speech was slurred, and he smelled of alcohol. He responded profanely and belligerently to the initial police investigation. An altercation ensued. Five police officers and the administration of pepper spray were required to restrain him. A subsequent search of his vehicle revealed a bottle of vodka that was two-thirds full and a handgun that was loaded and not registered. The evidence led to a number of convictions already affirmed on appeal. *People v Green*, 260 Mich App 392, 394; 677 NW2d 363 (2004).

He was brought, bound hand and foot, on a gurney to defendants. He struggled to free himself, thrashed about, screamed, and spat. He refused to answer questions about his medical history. He threatened to kill others and pleaded that he too be killed. He allegedly falsely asserted that his wife was a physician, and he was an attorney. Observers described his behavior as violent, irrational, and abusive. Defendants drew a blood sample with a needle and obtained a

urine sample by a catheter. Chemical tests revealed a blood alcohol level of 0.26 percent. According to the doctor, “my intent was to medically treat any serious illnesses that could cause his behavior, that could cause him to act violently or inappropriately.” Police did not ask or order the doctor to do any specific task. Plaintiff was released into the custody of police to be taken to jail approximately two hours after he was brought to the medical facility.

The Oakland Circuit Court issued an order on December 14, 2000, directing defendant Providence to produce records of the blood draw. Providence received a letter dated March 1, 2001, from the Oakland County prosecutor’s office. Citing MCL 257.625a(6)(e), the letter requested, among other things, “all records related to the blood draw and subsequent toxicological analysis.” Providence complied with the prosecutor’s request. The court granted summary disposition under MCR 2.116(C)(7) on the ground of statutory immunity. We review summary disposition decisions *de novo*. *Maskery v Board of Regents of the University of Michigan*, 468 Mich 609, 613; 664 NW2d 165 (2003). Statutory construction is a question of law that is subject to *de novo* review. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

The issues on appeal are 1) whether the court erred in its interpretation of MCL 333.6501 *et seq.*, when it found that plaintiff was incapacitated, in protective custody, and not under arrest when he encountered defendants, 2) whether defendants were entitled to immunity under MCL 333.6508, 3) whether MCL 333.6502 allows drug testing without plaintiff’s consent, and 4) whether defendants lawfully released evidence of plaintiff’s drug test to prosecutors.

Plaintiff first argues that the court erred when it found that plaintiff was incapacitated and in protective custody. We disagree.

“Incapacitated” means that an individual, as a result of the use of alcohol, is unconscious or has his or her mental or physical functioning so impaired that he or she either poses an immediate and substantial danger to his or her own health and safety or is endangering the health and safety of the public. [MCL 333.6104.]

The evidence in the record conclusively demonstrated that plaintiff was incapacitated when police brought him to defendants. Plaintiff exhibited telltale signs of intoxication. He smelled of alcohol, had bloodshot eyes, and slurred his speech. He responded profanely and abusively to preliminary police questions. Multiple officers had to restrain him as he kicked and struggled. He threatened to kill others and asked that he be killed. He was poised to continue driving his already damaged car, which contained more alcohol and a loaded firearm. In light of the circumstances, plaintiff was impaired from his consumption of alcohol, and he was an immediate and substantial danger to himself and others. Plaintiff’s suggestion that he could have safely left the parking lot on his own is simply untrue. Furthermore, the relevant statute only requires the appearance of incapacitation. MCL 333.6501(1). Thus, police and defendants had the following duty:

An individual who appears to be incapacitated in a public place *shall* be taken into protective custody by a law enforcement officer and taken to an approved service program, or to an emergency medical service. . . . When requested by a law enforcement officer, an emergency service unit or staff *shall*

provide transportation for the individual to an approved service program or an emergency medical service. [MCL 333.6501(1) (emphasis added).]

It is not clear when plaintiff was placed under arrest. The statute expressly states that police acting under section 6501(1) are not making an arrest:

The taking of an individual to an approved service program, emergency medical service, or transfer facility under subsection (1) is not an arrest, but is a taking into protective custody with or without consent of the individual. The law enforcement officer shall inform the individual that he or she is being held in protective custody and is not under arrest. An entry or other record shall not be made to indicate that the individual was arrested or charged with either a crime or being incapacitated. An entry shall be made indicating the date, time, and place of the taking, but the entry shall not be treated for any purpose as an arrest or criminal record. [MCL 333.6501(3).]

Although the record does not indicate that police told plaintiff he was being held in protective custody and not under arrest, failure to do so does not automatically transform what happened into an arrest. Furthermore, plaintiff has not argued at what point he was arrested or for what crime. A party may not leave it to this Court to search for the factual basis to sustain or reject his argument. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).¹

Plaintiff next appears to argue that summary disposition on immunity grounds was improper because defendants acted with wilful and wanton misconduct. We disagree.

Michigan grants statutory immunity to medical personnel treating an incapacitated individual who is brought in for medical treatment. MCL 333.6508 provides:

(1) A law enforcement officer, a member of the emergency service unit, or staff member of an approved service program or an emergency medical service who acts in compliance with this part is acting in the course of his or her official duty and is not criminally or civilly liable therefor.

(2) Subsection (1) does not apply to a law enforcement officer, member of the emergency service unit, or staff member of an approved service program or an emergency medical service who, while acting in compliance with this part, engages in behavior involving gross negligence or wilful and wanton misconduct.

Defendants acted in the course of their official duties when they treated plaintiff. Accordingly, they were immune unless they acted with gross negligence or they undertook willful and wanton

¹ Plaintiff briefly argued that he was not in a public place at the time of his encounter because he was on private property. The argument is unpersuasive. As plaintiff demonstrated, any member of the public can enter Ford's visitor lot at any time for others to witness. The trial court did not err when it found that plaintiff was incapacitated and in a public place.

misconduct. Plaintiff testified that defendants assaulted and battered him (from the blood draw), committed first-degree criminal sexual conduct (from the catheterization), and unlawfully released his medical records. Plaintiff claimed he was injured because the information contributed to his conviction and loss of employment. Plaintiff pleaded and proved no permanent physical injuries due to the blood draw or catheter. He presents no basis for concluding other than that defendants did their job. Rather, the documentation provided indicates that defendants were merely exploring the causes of plaintiff's condition.

Plaintiff next argues that the court erred when it found that plaintiff did not have to consent to the chemical testing. We disagree.

The plain language of MCL 333.6502(1) granted the doctor the authority to order the drug testing:

An individual who is taken to an approved service program or emergency medical service pursuant to section 6501(1) shall continue to be in protective custody and shall be examined by a licensed physician or his or her designated representative as soon as possible, but not longer than 8 hours. The licensed physician or designated representative may conduct a chemical test to determine the amount of alcohol in the bloodstream of the individual. The physician or designated representative shall inform the individual of his or her right to such a test and shall conduct a test at the request of the individual.

The word "may" in the second sentence indicates the discretionary nature of the physician's authority. See *Old Kent Bank v KAL Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003) (the word "may" designates discretion). Nowhere does the statute condition that discretion on the approval of the patient. Such a condition would make little sense because the patient must be "incapacitated," which includes under the term's statutory definition the unconscious, who cannot possibly grant consent. MCL 333.6104.

Plaintiff claims that defendants never informed him of his right to a test. Even if true, failure to do so does not erase the second sentence granting discretion. The statute only grants the individual the right to request a test, not the right to stop the doctor from ordering one. If it did, then the second sentence would be rendered useless because the same outcome would result if the statute did not contain that sentence. In construing a statute, this Court presumes that every word has some meaning and avoids any construction which would render any part of it surplusage or nugatory. See e.g., *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004).

Plaintiff also claims that the doctor's power under the statute is merely permissive. To the extent that the authority is permissive, it is permissive at the doctor's own discretion, not that of the patient as plaintiff presumes. The doctor in this case observed plaintiff's condition and determined in his best medical judgment that tests were in order. Had defendants done otherwise, they would have ignored the possibility that plaintiff was in the grips of a debilitating medical illness requiring immediate treatment. The statute granted defendants the authority to test without the consent of plaintiff.

Plaintiff next claims that the court improperly dismissed his claim stemming from the release of his medical records. We disagree.

According to the public health code:

If an individual who is the subject of a record maintained under section 6111 does not give written consent, the content of the record may be disclosed only as follows:

* * *

(c) Upon application, a court of competent jurisdiction may order disclosure of whether a specific individual is under treatment by an agency. In all other respects the confidentiality shall be the same as the physician-patient relationship provided by law. [MCL 333.6113.]

The record reveals that the confidentiality of plaintiff's records was given the same treatment under law as the physician-patient relationship, meeting the requirement of subsection (c). The circuit court issued an order directing defendants to produce records of the blood draw. Defendants later received a letter from the Oakland County prosecutor's office. Citing MCL 257.625a(6)(e), the letter requested, among other things, "all records related to the blood draw and subsequent toxicological analysis." MCL 333.6113(c) was satisfied because the qualified confidentiality of plaintiff's medical records under section MCL 257.625a(6)(e) was "the same as the physician-patient relationship provided by law." MCL 333.6113(c). According to the statute the prosecutor cited:

If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision. A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure. [MCL 257.625a(6)(e).]

The language of the statute is clear. Defendants were required to turn over the evidence requested, and plaintiff was barred from recovering in a suit against them for disclosure. Plaintiff did not challenge the applicability of MCL 257.625a(6)(e). Evidence about the condition of plaintiff's vehicle (shredded tire and grass and weeds lodged in frame) led police to reasonably believe that plaintiff had been in an accident. Therefore, plaintiff's claim was properly dismissed.

Finally, this Court will not consider plaintiff's Fourth Amendment argument challenging the drug test as an unconstitutional search and seizure. The trial court did not hear or decide this issue. Unpreserved claims of error are generally disfavored. See e.g., *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Affirmed.

/s/ Christopher M. Murray

/s/ Patrick M. Meter

/s/ Donald S. Owens